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In the Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

DAVID R. BABB,

Petitioner,

vs.

RAY MARELLI, TRUSTEE OF THE ESTATE OF HERBERT L. SARVER AND DOYLE D. SARVER d/b/a G. P. PERKINS, BANKRUPTS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, David R. Babb, respectfully prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

REPORTS IN THE COURTS BELOW

The Referee's Original Order, dated April 24, 1968 (Appendix A), the Referee's Report, dated April 24, 1968 (Appendix B), the District Judge's Order on Petition for Review, dated June 18, 1968 (Appendix C) and the Referee's Amended Order, dated June 24, 1968 (Appendix D) were all considered by the Court of Appeals.

The Order of the Court of Appeals for the Seventh Circuit, dated February 27, 1969, sought to be reviewed is set forth in Appendix E.

None of the opinions are reported.

JURISDICTION

The Court of Appeals Judgment was entered February 27, 1969, and the Jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1) and 11 U.S.C. §47c.

QUESTIONS PRESENTED

Is it the intent of Section 64 of the Bankruptcy Act to give first priority to otherwise *reasonable* expenses of administration, even to the total exclusion of lower priority creditors?

Can continued competent administration of *small* and *difficult* bankruptcy cases be expected, if reasonable costs of administration are regularly denied solely because of insufficient assets?

Is the Administrative Office of the United States Courts imposing a statistical standard upon the Referees and Judges of the District Courts, which although not shown in the record of a particular case, results in judicial decision which makes *good statistics* rather than *good administration*?

Is there a new recurring important problem in the determination of costs of administration, since statistical performance is now under increased scrutiny, which should be considered by this Court at this time?

What philosophy of bankruptcy administration will best protect all classes of creditors in the *nominal assets estate?*

Is there a substantial conflict between the decisions of the Court of Appeals of the Seventh Circuit and decisions heretofore rendered in the Ninth Circuit?

Has the Court of Appeals of the Seventh Circuit failed to interpret an important question of Federal Statutory Law which should be settled by this Court?

STATUTES INVOLVED

Bankruptcy Act, Chapter VII.

Section 64(a) (11 U.S.C. §104) "The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) the costs and expenses of administration . . ."

STATEMENT OF THE CASE

This case arises out of proceedings in bankruptcy under the Bankruptcy Act. In the Sarver estate, there were relatively few assets after ultimate disposition and compromise of claims.

The legal services required for administration consisted largely of setting aside many disputed secured claims, some of which matters were considered by the District Court on Petition for Review and then appealed

to the Court of Appeals before administration was completed. There literally were no unsecured non-exempt assets in the case except those discovered by the initiative of the Trustee and his Attorney.

At the time the Petition in Bankruptcy was filed and on the face of the Bankruptcy Petition, this case was typical of thousands of cases which are normally reported *no assets.* The Trustee in this case, through his attorney, critically reviewed the claimed liens and successfully contested the validity of a great majority.

As it turned out some large contested liens had to be compromised by the Trustee, simply because there was not sufficient value in the estate to justify further defense of appeals despite the fact that successive court decisions, had all been in favor of the trustee.

The amount of the fee for the Trustee's attorney is at issue. The Referee specifically found: "The Trustee and his attorneys worked long hard and successfully. There are no duplications of attorneys' fees". (Appendix B)

The findings of the Referee is interpreted to mean that the fee requested was fair and reasonable in every respect.

If that fee (and other fees not here at issue) were allowed, all of the assets of the estate would have been exhausted before paying claims of general creditors. The Referee disregarded priority and applied an arbitrary 30% reduction to all fees so that, as he reasoned, there would be enough money to pay a general creditor dividend of 20%. (Appendix B)

This matter was heard upon petition for review upon objection of both Attorney Babb and the Trustee, both of

whom had similar percentage reduction in requested fees. The District Court summarily restored the Trustee to his requested fee (which was the statutory amount) by granting a $250.27 increase and at the same time summarily reduced the fee of Attorney Babb by an additional $319.90 leaving the attorney a net fee of $1,000.00. The District Court therefore *found* the money to pay the statutory fee by further *reducing* the discretionary fee of the attorney who successfully brought the matter to the Court's attention, leaving the dividend to general creditors essentially unchanged. (Appendix C).

The Court of Appeals affirmed the increase in the Trustee's fee and ordered the $1,319.90 attorney's fee reinstated. That Court, after fully reviewing the Referee's reasoning, made a specific finding confirming the reasonableness of the originally requested $4,733.00 attorney's fee by stating "There is no cause to believe that the claims [for service] were not otherwise proper and allowable in full." (Appendix E).

ARGUMENT

The Petitioner comes to this Court as a young lawyer, but none the less experienced and knowledgeable in the mundane and difficult phases of *nominal asset case* bankruptcy administration.

The small amount of fees at stake here are of incidental importance compared to the impact that an appropriate decision in this case could have upon the practice of bankruptcy administration by able lawyers in small communities.

The Petitioner believes that the proper purpose and philosophy of the Bankruptcy Act, briefly stated, is that all of the assets should be collected and that all improperly secured liens should be set aside and that assets should be distributed to creditors according to their priority.

The Petitioner believes that important classes of priority claims, including state and local taxes and federal taxes, should be given consideration and that satisfactory administration of an estate may be accomplished if some or all of these priority claims are paid without any payment whatsoever to general creditors. The Petitioner believes, as a matter of policy, that it is important that a maximum number of bankruptcy cases be administered, even though in a certain percentage there are no dividends to general creditors.

The Petitioner contends that in view of the infrequency that the question of *nominal estate cases* comes before the Supreme Court, and in view of the great frequency with which the question of administrative expenses must be decided by referees throughout the country in the day to

day administration of bankruptcy cases, it is desirable that this Court consider the question presented and make a specific finding to the effect that Section 64 of the Bankruptcy Act requires that expenses of administration, including fair and reasonable attorney's fees, be paid as a *first priority expense in advance of the payment of dividends to creditors,* even though no assets remain for distribution to general creditors.

The Petitioner knows from experience that ten or twenty percent of the so called *nominal asset cases* turn out to have hidden assets and that by diligently pursuing these cases, excellent results can be achieved and that ultimately some cases are raised above the *nominal asset case* level and dividends are paid to creditors. Necessarily, an attorney handling this type of case is underpaid if he only realizes a fee on one out of five cases, but the unfairness is compounded when his fee is further cut to one-third or one-fourth of a fair and reasonable fee in the occasional case where he is successful. Diligent administration of nominal asset cases should be encouraged to carry forth the intent of the Bankruptcy Act.

The Petitioner recognizes and asks the Court to recognize that there are certain justifiable instances when, after applying priorities in proper order, the money runs out and there are not sufficient funds to pay all priority claims prior to general creditors.

The Petitioner contends that this occurs most frequently in the *nominal asset cases,* and that the *nominal asset cases* are the majority of bankruptcy cases which are or ought to be administered even though they are by far the minority of cases reviewed by a higher court.

The Petitioner believes that reasonable expenses incurred by the Trustee in accomplishing these purposes should be

paid as a priority claim in accordance with statute. The Petitioner does not attempt to define reasonable, for there has never been any contention in the present case that the fees requested are not fair and reasonable in every respect.

The Petitioner does contend, however, that when this standard of reasonableness of fees for administration has been met that all of those fees should be paid in full as priority claims under the statute.

The Petitioner believes that the philosophy of the courts below results in attorneys and trustees ignoring potential assets and reporting *nominal asset cases* as *no asset cases* for the purpose of avoiding administration.

Petitioner believes the Court through its Administrative Office now reviews the statistics on *Bankruptcy Cost Studies* and *blindly approves* them each year, saying *this is good,* not realizing that the failure to administer many reported *no asset* cases is detrimental to the rights of all classes of creditors. According to the practice in bankruptcy courts today, fraud by debtors has little chance of being detected if the debtor's petition shows *no assets* on its face. There is no longer a system of checks and balances because in many *nominal asset cases* there is no administration.

Petitioner believes that U. S. Supreme Court through its Administrative Office, all of which is nowhere a part of the record in this case, has promulgated statistics and administrative orders which have had the effect of encouraging a majority of the Referees and Judges in the Northern District of Illinois and elsewhere to attempt to make all bankruptcy cases fall into certain pre-established norms. The statistics look good but they look good only because *high expense* cases are not administered.

In the case at hand, both the Referee in his finding that "the trustee and his attorneys worked long, hard and successfully. There were no duplication of attorneys' fees" (Appendix B) and the Court of Appeals by its finding "there is no cause to believe that the claims [for service] were not otherwise proper and allowable in full" (Appendix E) have made specific findings that the fees were fair and reasonable.

The Court of Appeals in the Ninth Circuit, on a similar set of facts, held

> "We think that the economical spirit of the Bankruptcy Act does not require, nor justify, reducing a requested fee where, as here, by all other proper standards, it is a fair and reasonable one . . . "
>
> *Jacobowitz* v. *Double Seven,* 378 F. 2d 405, 9th Cir. 1967.

By substituting the words "success achieved" for "economical spirit of the Bankruptcy Act" the Court of Appeals for the Seventh Circuit come to an exactly opposite conclusion disallowing fees which it further finds "there is no cause to believe . . . were not proper and allowable in full." (Appendix E). Amazingly enough the Court of Appeals for the Seventh Circuit cite as authority the *Jacobowitz* case in the Ninth Circuit with which they are in conflict.

The statutory language with respect to priority was expanded and clarified in 1962. The Statute now clearly eliminates any ambiguity which existed in the past by stating:

> "*The debts to have priority in advance of the payment of dividends to creditors,* and to be paid in full out of the bankrupt estates, and the order of payment shall be (1) *the costs and expenses of administration* . . . " (emphasis added).
>
> Bankruptcy Act, Section 64 (a); 11 U.S.C. §104.

It is Petitioner's primary contention that the Court of Appeals of the Seventh Circuit has clearly made a decision that is completely contrary to the clear meaning of the statutory language. Priority must be recognized once the fees have been found to be fair and reasonable. No other interpretation is possible.

The Statute is in need of interpretation and this Court is asked to make a finding that the priority of debts required by the 1962 revision of Section 64 of the Bankruptcy Act be given full force and effect.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

DAVID R. BABB, *pro se*
Petitioner

APPENDIX A

Referee's Original Order

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

In Bankruptcy
No. 65 B 521

IN THE MATTER OF
HERBERT L. SARVER & DOYLE D. SARVER, d/b/a G. P. PERKINS
Bankrupt

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF APPROVAL OF REPORTS AND ACCOUNTS, ALLOWANCES OF FEES AND EXPENSES OF ADMINISTRATION, AND OTHER BUSINESS AT FINAL MEETING OF CREDITORS.

At Dixon in said District and Division on the 24th day of April, 1968.

This matter coming on for hearing on December 21, 1968 at the final meeting of creditors, after due notice by mail to creditors as required by law, and judicial notice having been taken of the pleadings, reports and other documents on file, and from such other evidence as has been adduced, the Court, being fully advised in the premises, finds that the net realization in this estate is in the sum of $9,775.61 and from this finding, the Court concludes that the allowance made in this order for the Referees' Salary & Expense Fund is based on said sum and is proper.

IT IS HEREBY ORDERED THAT:

1. The following reports and accounts be and they are hereby approved: Final Report and Account of ....., Receiver and Final Report and Account of Ray Marelli, Trustee.

2. The allowances of fees and charges set forth in this paragraph are proper and the trustee herein is hereby authorized and directed to make the following disbursements from the funds remaining in his hands for expenses of administration:

Receiver's Fee	.....	
Receiver's Cash Advances	.....	
Receiver's Unpaid Liabilities	.....	.....
Trustee's Fee	107.29	
Trustee's Cash Advances	.....	.....
Trustee's Unpaid Liabilities	36.50	143.79
Court Reporter's Services	.....	.....
Referees' Salary & Expense Fund		281.14
(Check to be made payable to Elbert A. Wagner, Jr., Clerk of U. S. District Court)		
Attorney for Receiver—Fee	.....	
Attorney for Receiver—Expenses	.....	.....
Attorney for Trustee—Fee	1,319.90	
Attorney for Trustee—Expenses	113.78	1,432.68
Special Attorney for Trustee—Fee	126.72	
Attorney for (Nettles)—Expenses	.....	126.72
Special Attorney for Trustee (Nack)—Fee	352.50	
Expenses	51.95	404.45
Expenses paid previously (including receivership expenses)		1,851.05
TOTAL ADMINISTRATIVE EXPENSES		$4,240.42

3. Of the balance then remaining in the hands of the Trustee, Namely $1,890.03, final dividends are declared and ordered paid as follows:

Character of Claims	*Total Amt. Allowed*	*Dividend Amt.*	*Declared Per-centage*
Priority wage claim	$ 100.00	$ 100.00	100%
Priority tax claim	218.83	218.83	100%
General unsecured claims	$7,824.73	$1,571.20	20.08%

4. The Receiver herein be and he is hereby discharged and his bond cancelled.

Upon the filing of a Supplemental Report and Account by the Trustee herein, and submission of cancelled checks showing that payments ordered herein, and disbursement of all moneys in said estate has been completed, and that nothing further remains to be done, said Trustee will be discharged, his bond cancelled, and the sureties thereon released.

ENTER:

Sherwood Dixon

Referee in Bankruptcy

APPENDIX B

Referee's Report

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

In Bankruptcy
No. 65 B 521

IN THE MATTER OF
HERBERT L. SARVER & DOYLE D. SARVER, d/b/a G. P. PERKINS
Bankrupts.

To the Presiding Judge of said Court:

The following is submitted in compliance with Bankruptcy Rule 25(c)(2):

1. Total proceeds realized, per report		$9,755.61
Accounts sold at final meeting		20.00
Total		$9,775.61
2. Expenses of administration		
All expenses of receivership	1,707.55	
Expenses of trusteeship, per report	143.50	
Unpaid obligations		
Referees' Salary & Expense Fund	244.39	
Clerk: claims & notices	36.75	
Expenses of: Trustee	36.50	
Atty. Babb	113.78	
Atty. Nack	51.95	
Fees recommended	1,906.41	4,240.83

3. Percentage of total for administration 43.4%
4. Required for 1% dividend 78.24
5. Amount remaining for creditors after payment of allowances 1,890.03
   Dividends payable: Priority claims 100%
   General claims 20.08%
6. Prior dividends none

7. Allowances	*Applied for*	*Recommended*
Marelli, Trustee	357.66	107.29
Babb, atty. for trustee	4,733.60	1,319.90
Nettles, atty. for trustee	422.40	126.72
Nack, atty. for trustee	1,175.00	352.50
8. Compensation previously paid		
Marelli, receiver	212.19	
Babb, atty. for receiver	600.00	

9-10. Other information: reasons for recommendation.

When these bankrupts were adjudicated an application for a receiver was also filed. The difficulties and complications were apparent so I appointed a good man and authorized an attorney. There were conflicting claims and danger of loss of property so they immediately undertook a sale free and clear of liens with claims transferred to the proceeds and were so well along with the work that the sale was held within a matter of days after the first meeting.

There were eleven known or suspected secured creditors. Four of these and four others filed reclamation petitions and all were brought into the proceedings. All eight were contested by the trustee. Five were defeated and only three, for a total of $1,644.75 were allowed. One of those defeated was Mr. Perkins, who made most of the trouble in this case.

The most charitable thing I can say about the Sarver Brothers is that they just are not very bright. Mr. Perkins had sold them his business, which they operated under his name, but what they bought was a graveyard of worn out excavating and earth moving machinery. The only hope for any recovery for creditors lay in putting it in salable condition. The receiver-trustee exercised initiative and worked hard, even putting together usable parts of equipment made by different manufacturers. The result was a very successful sale, which brought in $8,609.75. But of course the expense of receivership and sale were heavy.

Mr. Perkins claimed all of the property except household goods and a few other articles, under a contract which he brandished from time to time but declined to exhibit until the contest of his reclamation petition. It provided for a sale price of $30,000.00 with a small down payment and the balance, by installments, *out of the profits from the business.* As the buyers went bankrupt within, I think, six months the answer seemed obvious. When this contest developed, I authorized the trustee to employ Mr. Nettles as additional counsel. Mr. Nettles died suddenly and Mr. Nack succeeded him. I found against Mr. Perkins, who petitioned for review. My findings were affirmed by Judge Parsons. Just within the time for so doing Mr. Perkins took his case to the Court of Appeals. Months of delay and of sparring and conferring among the attorneys followed. Finally they reached an agreement to compromise for $2,000.00 and I approved it. I felt that the trustee would win but further expense to the creditors seemed unjustifiable.

Then the trustee, among other things, contested seven claims for a total of $3,972.00. Six of these he completely defeated and one labor claim for $500.00 was allowed, on contest, for only $100.00.

I recite this long story to show that the trustee and his attorneys worked long, hard and successfully. There are no duplications of attorneys' fees. Except for a few conferences, they worked separately.

However one of the elements, "success achieved" is usually equated with results obtained for general creditors. At the end of all of this work there is very little left for general creditors. By recommending that the trustee and attorneys receive 30% of the fees applied for there will be only enough left to pay a dividend of 20.08%

Dated at Dixon, Illinois, April 24, 1968.

Referee in Bankruptcy
Sherwood Dixon

APPENDIX C

District Court's Order on Petition for Review

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

Name of Presiding Judge,
Honorable Alexander J. Napoli

Cause No. 65 B 521 Date June 18, 1968

In the matter of Herbert L. Sarver & Doyle D. Sarver, d/b/a G. P. Perkins, Bankrupts.

This cause coming to be heard on a petition for review of an order entered by the referee on April 24, 1968; and also pursuant to Rule 25(f)(2) of the Bankruptcy Rules of this Court, for review of the same order; the time for filing of briefs pursuant to Rule 26(e) of the Bankruptcy Rules of this Court having elapsed; the Court having considered the entire file in this matter, IT IS ORDERED that the fee allowed to the trustee be increased to $357.66; that the fee allowed to David Babb, attorney for the trustee, be reduced to $1000; and that all other portions of the referee's order of April 24, 1968, be, and are hereby, affirmed. Order cause remanded to referee for entry of appropriate final order.

Alexander J. Napoli
Judge

APPENDIX D

Referee's Amended Order

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
WESTERN DIVISION

In Bankruptcy
No. 65 B 521

IN THE MATTER OF
HERBERT L. SARVER & DOYLE D. SARVER, d/b/a G. P. PERKINS
Bankrupts.

AMENDED
FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER OF APPROVAL OF REPORTS AND ACCOUNTS, ALLOWANCES OF FEES AND EXPENSES OF ADMINISTRATION, AND OTHER BUSINESS AT FINAL MEETING OF CREDITORS.

At Dixon in said District and Division on the 24th day of June, 1968.

This matter coming on for hearing on December 21, 1967 at the final meeting of creditors, after due notice by mail to creditors as required by law, and judicial notice having been taken of the pleadings, reports and other documents on file, and from such other evidence as has been adduced, the Court, being fully advised in the premises, finds that the net realization in this estate is in the sum of $9,775.61 and from this finding, the Court concludes that the allowance made in this order for the Referees' Salary & Expense Fund is based on said sum and is proper.

IT IS HEREBY ORDERED THAT:

1. The following reports and accounts be and they are hereby approved: Final Report and Account of ....., Receiver and Final Report and Account of Ray Marelli, Trustee.

2. The allowances of fees and charges set forth in this paragraph are proper and the trustee herein is hereby authorized and directed to make the following disbursements from the funds remaining in his hands for expenses of administration:

Receiver's Fee	.....	
Receiver's Cash Advances	.....	
Receiver's Unpaid Liabilities	.....	.....
Trustee's Fee	357.66	
Trustee's Cash Advances	.....	
Trustee's Unpaid Liabilities	36.50	394.16
Court Reporter's Services		.....
Referees' Salary & Expense Fund (Check to be made payable to Elbert A. Wagner, Jr., Clerk of U.S. District Court)		281.14
Attorney for Receiver—Fee	.....	
Attorney for Receiver—Expenses	.....	.....
Attorney for Trustee—Fee	1,000.00	
Attorney for Trustee—Expenses	113.78	1,113.78
Special Attorney for Trustee (Nettles)—Fee	126.72	
Expenses	.....	126.72
Special Attorney for Trustee (Nack)—Fee	352.50	
Expenses	51.95	404.45
Expenses paid previously		1,851.05
TOTAL ADMINISTRATIVE EXPENSES		$4,171.30

3. Of the balance then remaining in the hands of the Trustee, Namely $1,959.56; final dividends are declared and ordered paid as follows:

Character of Claims	*Total Amt. Allowed*	*Dividend Amt.*	*Declared Percentage*
Priority Wage Claim	100.00	$ 100.00	100%
Priority Tax Claim	218.83	$ 218.83	100%
General Unsecured Claims	7,824.73	$1,640.73	20.9685%

(Secured claims of $3,644.75 paid previously)

4. The Receiver herein be and he is hereby discharged and his bond cancelled.

Upon the filing of a Supplemental Report and Account by the Trustee herein, and submission of cancelled checks showing that payments ordered herein, and disbursement of all moneys in said estate has been completed, and that nothing further remains to be done, said Trustee will be discharged, his bond cancelled, and the sureties thereon released.

ENTER:

Sherwood Dixon

Referee in Bankruptcy

APPENDIX E

Order Sought to be Reviewed

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago 10, Illinois
February 27, 1969

Before

HON. JOHN S. HASTINGS, *Senior Circuit Judge*
HON. ROGER J. KILEY, *Circuit Judge*
HON. THOMAS E. FAIRCHILD, *Circuit Judge*

No. 17083

In the Matter of
HERBERT L. SARVER & DOYLE D. SARVER, d/b/a G. P. PERKINS
No. 65 B 521 *Bankrupts.*

DAVID R. BABB, Attorney for Trustee,
Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Western Division.

ORDER

In this bankruptcy proceeding, No. 65 B 521 pending in the United States District Court for the Northern District of Illinois, Western Division, Ray Marelli was duly appointed trustee and David R. Babb as attorney for the trustee by the Honorable Sherwood Dixon, Referee. After

extended litigation, the Referee approved the final report and account of the trustee and, *inter alia*, made an allowance of $107.29 to the trustee for services, this being 30% of the requested amount of $357.56, and $1319.90 to the attorney for the trustee, this being 28% of the requested amount of $4733.00. After payment of all expenses and allowances of costs of administration (including a receivership and a trusteeship) and priority claims in full, there remained a dividend of 20.08% payable to creditors with general claims.

Referee Dixon acknowledged that the net result was attributable to the long, hard and successful individual work of the trustee and his attorney, without duplication of attorney's fees. However, the Referee felt constrained to equate such "success achieved" with results obtained for the general creditors and made the foregoing drastic cuts in the requested fees for services. There is no cause to believe that the claims were not otherwise proper and allowable in full.

The trustee and his attorney petitioned the district court for review of the order of the Referee making the allowances of fees. The court, without any statement of reasons, summarily ordered that the fee allowed to the trustee be *increased* to $357.66 (the original amount requested); that the fee allowed to the attorney for the trustee be *reduced* to $1000 (from $1319.90 allowed by the Referee); and otherwise approved the report.

On remand, the Referee ordered the allowances as fixed by the district court. Attorney Babb, *pro se*, alone appeals. No appearance or brief was filed by an appellee. We heard appellant Babb on oral argument.

Our examination of the record and appellant's brief convinces us that the district court, in the absence of any showing or finding that the Referee abused his discretion in awarding the attorney's fee in the amount of $1319.90, erred in reducing the fee to $1000. We find no error in the increase allowed the trustee. Accordingly, the Referee's order on remand fixing the fee for the trustee's attorney in the sum of $1000 is vacated. This matter is remanded to the district court with directions to reinstate the allowance of the fee of David R. Babb for his services as attorney for the trustee in the sum of $1319.90. See Jacobowitz v. Double Seven Corporation, 9 Cir., 378 F. 2d 405 (1967).

Vacated and Remanded.